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Supreme Court of the United States

OCTOBER TERM, 1945.

No. 564.

BOYD L. KITHCART, PETITIONER,

VS.

METROPOLITAN LIFE INSURANCE COMPANY,
A CORPORATION, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PRIOR PETITION FOR WRIT OF CERTIORARI DENIED

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STATEMENT OF THE GROUNDS CLAIMED FOR JURISDICTION.

The Petitioner invokes the jurisdiction of this court by virtue of its discretionary powers under Sec. 347 of Title 28, U. S. C. A., providing for the granting of writs of certiorari to the various Circuit Courts of Appeals; he also asserts jurisdiction under Sec. 377 of Title 28, U. S. C. A., providing for the issuance of writs not provided for by Statute (See Petition for Certiorari, pp. 38-39).

STATEMENT OF THE CASE.

We feel that petitioner's statement is both incomplete and confusing and we shall, therefore, supplement it. Two printed records have been filed here; the one numbered 13008 is the printed record of the present case in the Circuit Court of Appeals; the one numbered 11880 is the record there in a prior case, parts of which were incorporated into the present record without reprinting, by permission of the Circuit Court of Appeals (69, 70). Figures in parentheses in our brief refer to pages of the present printed record (13008), except that such figures followed by the numerals "11880" refer to pages of such previous record.

This action is the *sixth* in a series of suits by petitioner against respondent (which have consumed a period of fourteen years), all arising out of the issuance to him of an accident insurance policy under date of June 14, 1929. All these actions were formerly pending in the United States District Court for the Western District of Missouri, either under its original jurisdiction or by removal. The District Court in the present case (sustaining respondent's motion to dismiss) took *judicial notice* of all such prior proceedings and ordered them incorporated into the record (50, 51). The appeal was taken from an order sustaining respondent's motion to dismiss (45, 46) the petitioner's "Amended Petition," or Amended Complaint, which covers (without exhibits) 24 pages of the printed transcript (3-26). No request was made for leave to amend, and the Circuit Court of Appeals for the Eighth Circuit affirmed the order of dismissal (150 F. 2d 997).

The motion to dismiss (45, 46) raises three matters: (1) failure to state a claim upon which relief can be

granted; (2) that all alleged issues are *res adjudicata;* (3) laches and the statutes of limitation of Missouri. We consider that all three questions are still definitely in the case and that certain brief chronological references to the facts (including references to the prior proceedings) are necessary to an intelligent understanding of the questions now involved. Much of the so-called "statements" in petitioner's petition and brief is in reality argument, and the language is not accurately confined to the allegations of the pleadings in the various actions. Petitioner assumes as a *fact* (petition (2)) that all prior actions were on *different* causes of action. In our references to prior proceedings the present petitioner may sometimes be referred to as the plaintiff, and the present respondent as the defendant.

On February 2, 1932 (on removal transcript), there was filed in the District Court a suit at law by this petitioner as plaintiff against this respondent as defendant on the accident policy in question, he claiming that total and permanent disability had been caused by an accidental fall directly and independently of all other causes (46-53, 11880). The policy sued on is shown there, and also at pages 27-33 of the present transcript. After an amendment of the petition (53-55, 11880), defendant answered (55-59, 11880), denying the receipt of *notice* of the accident as required by the policy terms, denying the existence of total disability caused directly and independently of all other causes by external, violent, and accidental means and stating that if plaintiff was totally disabled (which it denied) such was caused wholly or partly, directly or indirectly, by disease or bodily or mental infirmity (as per the *exclusion* provision of the policy); the answer also contained a general denial (58, 11880). No reply was filed. Trial was had, much evidence was introduced on all the issues, peremptory declarations were

requested by the defendant (embodying these same defenses and no others, 59, 60, 11880) and refused, the jury was *fully charged* on all these defenses (61-77, 11880) and a *general verdict* was returned for the defendant upon which a judgment was entered on May 18, 1933 (61, 11880). A motion for new trial was filed and overruled and *no appeal taken.*

On May 16, 1935, the petitioner as plaintiff filed directly in the District Court a complaint in equity to set aside that judgment on the ground of supposed fraud (78-82, 11880); that complaint alleged (omitting much verbiage): that plaintiff told the agent or agents who solicited the policy that an army surgeon in 1918 had erroneously diagnosed him as being afflicted with *dementia praecox* (a form of insanity), that he denied to the agent that he was insane, that the agent then had him examined by a physician, who was also told of the action of the army surgeon, that the agent assured plaintiff *"that no question of sanity would or could be raised by defendant"* (80, 11880), that he was led to believe by *defendant* and its agents that no such defense would be made; *that defendant issued the policy with full knowledge and waived all such defenses* (80, 11880) but thereafter fraudulently concealed and hid its records, the whereabouts of the agent (Denison), and the fact of a medical examination, and that plaintiff was thereby fraudulently deprived of the necessary testimony to combat the "defense"; this complaint contained various loose allegations of diligence, the discovery of *"positive evidence"* (82, 11880) *of such fraud,* etc., and prayed that the original judgment be set aside, and for general relief. Motion to dismiss was filed (83, 11880) and sustained (86, 11880). That case was appealed, the decree dismissing the bill was affirmed (See *Kithcart* v. *Metropolitan,*

88 F. 2d 407), and the matter supposedly disposed of. The court there noted the various steps which plaintiff might and should have taken in the trial of the law action to protect himself against an adverse judgment or a submission of the case if the facts then (and now) claimed were true.

In 1938 two additional suits were filed in rapid succession in the State Court by this plaintiff against defendant and three individuals named as its agents. These petitions appear at pages 88-97, 11880. These cases were each removed to the United States District Court (71, 72, of present record, also 92, 97, 11880). In each of those suits plaintiff alleged fraud on the part of defendant and its agents (alleged to have been acting within the scope of their authority) arising generally out of the same matters previously referred to, with some slight changes in detail; he claimed damages in the sum of $77,500. Each such suit was voluntarily dismissed after removal (92, 97-98, 103, 11880). It is perhaps worthy of note that in a motion to remand in the second of those cases, the plaintiff stated (100, 11880) that the suit was a tort action and not a continuation of any suit on the contract, that *"The judgment on the contract should not be set aside, that a new trial should not be granted on the policy"* and that the judgment in the prior equity suit was *"final and conclusive"* so far as any suit on the contract was concerned (This, it is noted, is precisely the contrary of his present contentions).

The next suit in equity was filed on April 18, 1940, again seeking to set aside the original law judgment of May 18, 1933 (1-34, 11880), and praying for an award of $77,700 and for general equitable relief. It is difficult to digest that lengthy complaint intelligently. The District Court also found that difficulty (44-45, 11880). It is necessary to attempt this, however, for the purpose of

comparing it with the present complaint on the question of *res adjudicata*. It is alleged: That one Denison solicited and negotiated with plaintiff for the policy in question, saying he was not employed by defendant but nevertheless conducting all the negotiations; that plaintiff told him about his diagnosis of dementia praecox in the army in 1918, and showed his army discharge bearing such an endorsement, telling him this was merely a "mistake"; that Denison said that he and Magoon (District Manager) and Marshall (allegedly Assistant General Manager) had investigated his army record, and that the company was satisfied; then followed a narrative concerning certain alleged "*preliminary instruments*" (*for the first time referred to in 1940*, although four previous suits had been filed and disposed of) as follows: That Denison drew up (a) a medical report stating that plaintiff had no bodily or mental disease, which report was allegedly signed by *plaintiff;* (b) an affidavit of the army physician stating that the insanity diagnosis was a *mistake;* (c) a letter reciting *Denison's* investigation and findings, but *signed by plaintiff;* (d) a *contract* (6-7, 11880) agreeing that plaintiff was of sound mind, body, health and earning power and that both parties were "*estopped*" to use any prior evidence to the contrary in any legal proceedings and that the company was *estopped from all objection that any prior mental or bodily diseases or infirmity contributed to any future disability;* that plaintiff signed this contract and Denison told him that the Manager and Assistant Manager had signed it, and that all the "*instruments*" had been sent to the company and were a part of the policy; that plaintiff also signed an application for the policy as directed by Denison who later delivered the policy, collected the premium and gave him a receipt, and said that the company had approved the "preliminary instruments"; that thereafter plaintiff was disabled solely

by accidental means (an alleged fall down the steps at his home less than seven months after the date of the policy), gave notice, and sued defendant on the policy; that defendant and its agents *conspired* together, and *cheated and defrauded him* of his rights to indemnity by concealing the "preliminary instruments" and their supposed approval, and by denying the employment of Denison; that he was thereby rendered unprepared to meet the defense (in the suit on the policy) that his supposed disability was caused wholly or partly by insanity; then followed various allegations regarding the previous equity suit in 1935, the other two suits in 1938, his supposed "diligence", and that "all (prior) allegations of fraud * * * were mere conclusions" (18, 11880); that he did not discover the facts alleged until Februray of 1939 including the allegations (and supposed facts) that defendant was actually a party to the "preliminary instruments," had "approved" them, and that the named agents were duly authorized, but that he did make such discoveries in February, 1939. Plaintiff prayed that the court take general equitable jurisdiction of the case, make "*right* the wrongs herein complained of" (21, 11880), that the judgment of May 18, 1933, be set aside, that he be awarded a judgment, "in keeping with the facts and the law," of $77,700 and for such "*other and further equitable relief*" as might be "just and proper." The previous petitions were all made part of this petition or complaint by reference and various exhibits were attached (21-34, 11880). A motion to dismiss (34, 11880) was filed, based upon the grounds (a) that the complaint failed to state any claim upon which relief could be granted, and also (b) that the alleged issues raised had been adjudicated both by the District Court and by the Circuit Court of Appeals. This motion was sustained

(35, 11880), and no request was made for leave to amend; on appeal the Circuit Court of Appeals affirmed, as shown at 119 F. 2d 497.

The present suit was filed on April 24, 1944, in the state court (1); it was duly removed (1, 39-45). The petition for removal alleged not only diversity of citizenship, but that the suit constituted an attack upon the prior judgments of the United States Courts, as referred to in the amended petition, and that the United States District Court had the rightful jurisdiction of the cause for the purpose of protecting its jurisdiction and former judgments. The amended complaint (or petition) appears at pages 3-37; that amendment was filed before the cause could even be removed. A digest of that complaint is difficult, if not impossible; the District Court attempted it (49-50). He sustained the motion to dismiss on the ground that the "amended petition" showed on its face (taking judicial notice of the prior proceedings, as the Circuit Court of Appeals had held he should—88 F. 2d 407) that "the controversy presented is *res adjudicata*." The present amended complaint refers to all the prior suits; in fact much of its content is devoted to discussions of those suits and conclusions concerning their supposed effect. Therein plaintiff again alleges all the same matters, with some changes and additions in wording, and some elaboration, but with no real change in substance. Since the amended complaint is set out in the record (3-26) and the court will undoubtedly read it we shall not digest it here in detail. We note, however, that this complaint (amended petition) shows affirmatively: plaintiff's knowledge of all the substantive facts alleged and of the claimed "frauds," at least as early as May, 1933, when the original law action was tried: and his full knowledge that *then* the defendant fully repudiated the supposed agreements, and that the court ruled out all

evidence thereof. Plaintiff now alleges no substantial or material facts (as distinguished from pure conclusions) which he did not know (or of which he was not charged with knowledge) in May, 1933. There is nothing new in the present amended petition except a change in the *title* and a slight change in the *prayer* (which we shall discuss briefly in the argument). Plaintiff again claims that all prior actions were "misconceived," claims that he is entitled to $50 per week as disability benefits *from January 11, 1930,* to the date of judgment, plus penalties, attorneys' fees and interest, and that the contract of insurance should be reformed by attaching the "documents" (or some of them) to the application, for the reason that as shown by the prior decisions plaintiff cannot recover on the policy as issued. It is further alleged that defendant should be required to pay the costs and attorneys' fees in *all the previous "misconceived" suits.* In other words, in Count 1 of this amended petition plaintiff seeks reformation, general relief and a decree for the payment of all the amounts so mentioned. In Count 2 he "adopts" the policy as so reformed, and prays judgment for all these sums of money, alleging again the issuance of the policy, the supposed accidental injury, the existence of supposed disability and the prayer for a money judgment.

After the case was lodged in the District Court upon removal, petitioner's counsel filed a "Plea to the Jurisdiction" (46-47) alleging that Sections 71 and 72, Title 28, U. S. C. A., providing for the removal of causes by reason of diversity of citizenship, were and are *unconstitutional.* This plea was overruled (48). Most of petitioner's argument (Petition for Certiorari, 44-66) is directed to this point. We shall answer it very briefly in the argument.

Neither the trial court nor the Circuit Court of Appeals has held that petitioner's present "amended petition" stated a claim upon which relief could be granted. The trial court rested its order and judgment upon the doctrine of *res adjudicata*, while the Circuit Court of Appeals, *without passing upon that question*, based its opinion upon the *Missouri Statutes of Limitation* and the established constructions thereof. Petitioner is asking this court to review anew the Missouri law on that question. However, both the question of limitations and the application of the doctrine of *res adjudicata* are still in the case, for if the motion to dismiss should have been sustained on either ground, the judgment is right, and certiorari should not be granted.

The present petition is novel, to say the least, for two reasons: (1) It seeks to retry substantially identical litigation which has been continuing for fourteen years and which has been disposed of by *four* District Court judgments and *three* affirmances by the Circuit Court of Appeals and (2) counsel, in the present petition, strenuously allege and insist that the *removal statutes* are unconstitutional and void, in the face of the uniform course of decisions of this court.

SUMMARY OF THE ARGUMENT.

I.

The motion of Respondent to dismiss the amended complaint (petition) was properly sustained because of the Statutes of Limitation of the State of Missouri (as determined by the Circuit Court of Appeals), and also because all matters alleged are *res adjudicata* (as determined by the District Court); for

A. The action, being one for relief on the ground of fraud, is barred by Sec. 1014, R. S. Mo., 1939, wherein the limitation period provided is five years after the discovery of the fraud, and no improper act *preventing* the commencement of an action within the meaning of Sec. 1031, R. S. Mo., 1939, has been shown; and even if the present action were one on a written contract, the limitation of ten years provided by Sec. 1013, R. S. Mo., 1939, had expired prior to the institution of the present suit.

B. All issues alleged in the present suit have been adjudicated in the prior litigation; the judgment in the original law action foreclosed all claims upon any contract which petitioner had with the respondent; the present suit is one upon a cause of action identical with prior equity suits between the parties, and the final judgments therein are a bar to this action; and even if the present suit were one upon a different cause of action, nevertheless, the precise contentions now made have been finally adjudicated adversely to the petitioner in those prior actions. The doctrine of *res adjudicata* (which petitioner seeks to ignore) must here be considered, for if the judgment below is correct for any reason raised, it will not be disturbed.

II.

The contention that the removal statutes (Secs. 71 and 72, Title 28, U. S. C. A.) are unconstitutional as in violation of the "Privileges and Immunities" clause of the Fourteenth Amendment, is without merit, and is made in the very teeth of the uniform decisions of this court; these statutes were enacted pursuant to the authority of Article III, Sections 1 and 2, of the Constitution, and also pursuant to Article I, Section 8; the Fourteenth Amendment is not in any wise a limitation upon the power of Congress to provide for the removal of causes by reason of diversity of citizenship, or otherwise, as provided in Article III; we are not here discussing the wisdom of those enactments (for that is a legislative matter), but, beyond all question, they are constitutional.

ARGUMENT.

I.

A. The Question of Limitations.

After three law actions and two prior equity suits, this present suit was instituted on March 10, 1944 (26). The law action on the policy was tried in May, 1933 61, 11880). The history of the subsequent suits is well related at 88 F. 2d 407, and 119 F. 2d 497. All subsequent actions have been based upon the *supposed* fraud of defendant and its agents in denying the supposed waiver-agreements, concealing records and witnesses and conspiring to defeat plaintiff of his rightful claims. Since the case is here on motion to dismiss, we must, for the sake of the argument, consider all of plaintiff's allegations, though the very statement of some of his claims raises a doubt of their merit.

As the Court of Appeals well pointed out, plaintiff's own allegations show that in May, 1933, defendant denied (both in testimony in the law action and by objections) the making of any such agreements and their effect if made, that it then and there *repudiated* any and all claims of plaintiff upon his present theory of *extending* the policy coverage, and offered evidence of prior insanity, along with sundry other defenses on the merits. As pointed out by the Court of Appeals in 88 F. 2d l. c. 410, plaintiff and his counsel then took *none* of the various steps which they might have adopted to protect against a final submission but elected to submit the case on the *other issues* besides "waiver." Plaintiff, himself, was a party to whatever had transpired and certainly these proceedings and *this repudiation* in May, 1933, put plain-

tiff on full and adequate notice that then and henceforth defendant denied for all purposes the making and creation of any waivers or estoppels, and that it stood firmly on the terms of the policy as issued and delivered. The defendant was there represented not only by witnesses, but by its counsel of record. And the District Court, by its very rulings, notified plaintiff that the present theory of collateral agreements was not available in a suit on the policy, as written. Plaintiff has now alleged *nothing* which can legally detract from the effect of the notice thus given. He has alleged nothing which would *legally* excuse him from attempting promptly to *reform* the policy, if he wished it reformed. What he now complains of is—not that he did not know the facts, for he asserts that he did all the time—but that the defendant did not furnish him all the evidence he desired and help him, then or thereafter, to make his case. This the defendant is not required to do (88 F. 2d l. c. 410). If there ever was any *fraud*, plaintiff discovered it fully in May, 1933, if not previously. The so-called later "discoveries" are purely statements of conclusions and of immaterial matters (as for instance whether the application was *witnessed* by Denison or Marquis—13). We repeat—there is *nothing* alleged which plaintiff did not know—or with which he was not legally charged with knowledge—at least as early as May, 1933. The Court of Appeals has not "ignored" any of his allegations.

We next consider Sec. 1014, R. S. Mo., 1939, providing that "*an action for relief on the ground of fraud*" shall be brought within five years of the discovery of the fraud. Note the wording: "An *action* (meaning *any* action) for *relief* (*i. e., any* kind of relief) *on the ground of* fraud!" That is to say, any action, for any form of relief, in which the plaintiff *bases* his right upon any

fraud of the defendant, is so limited. It should require no further argument, we think, to show that this section of the Statutes is applicable here. Every suit the plaintiff has filed since 1933 is based *solely* on allegations of fraud. It was held in *Ludwig* v. *Scott*, (Mo. Sup., 1933) 65 S. W. 2d 1034, that actions to cancel or reform instruments or contracts on the ground of fraud, except where the object of the suit is to recover real estate, are governed by this section. That case is one of these cited by the Circuit Court of Appeals (150 F. 2d 997, 999); and see also *Coleman* v. *Crescent Co.*, (Mo. Sup., 1943) 168 S. W. 2d 1060, 1065, which re-iterates the doctrine. The Circuit Court of Appeals, sitting in Missouri, has considered this suit as one seeking relief "*on the ground of fraud.*" Even plaintiff's so-called "discovery" of February, 1939 (13), which is really alleged to be nothing but a discovery as to what agent *witnessed* the application, occurred more than five years prior to the institution of the present suit (Record 26—March 10, 1944).

So far as concerns the contention that the running of this Statute (or any other Statute) was tolled by any "improper act" under Sec. 1031, R. S. Mo., 1939, we first call attention to the language of the Court of Appeals (150 F. 2d l. c. 1000):

> "But, while the 23-printed page petition abundantly uses the word fraud, it does not set out any facts which legally can be accepted as having prevented the general statute of limitations from commencing to run in 1933 against the insured's right to have the asserted provision incorporated in the policy."

And, also, as the court pointed out, the effect of any "*lulling*" statements previously made to plaintiff by defendant's agents would "*legally have ceased to exist*"

upon the trial of the law action, in view of the disclosures, repudiations and rulings then made. The allegations of supposed continuations of the fraud since 1933, of concealments, of "discoveries," etc., do not change the picture in any way; at most they relate to matters of *evidence,* not of *knowledge,* for plaintiff's knowledge was complete in 1933, including knowledge of the *claimed* intention of defendant to defraud him. And fraud, to be actionable for any purpose must be *secret and concealed,* not *patent or known* (*Wood* v. *Carpenter,* 101 U. S. 135, 140-141; *Pickford* v. *Talbott,* 225 U. S. 651), for any other rule would permit interminable litigation, upon the mere discovery of additional cumulative evidence. And an "*improper act*" under this section must be one in the nature of a legal fraud, which *prevents* the commencement of an action, *Davis* v. *Carp,* 258 Mo. 686, 698, 167 S. W. 1042; *Ball* v. *Gibbs,* (C. C. A. 8) 118 F. 2d 958. The very gist of Section 1031, *supra,* is that by an improper act (fraud, so construed) the commencement of an action *is prevented.* There has been no *prevention* here; plaintiff has in the interim instituted *four* other actions prior to this one all based on supposed fraud. His complaint is that he and his counsel *guessed* wrong on the remedy or remedies prayed for, until they were finally *convinced* upon the denial of certiorari by this court (after 12 years of prior litigation). The defendant is not responsible for their choice of remedies, nor for their obstinacy before being "*convinced*"; nor does all this detract from the fact that in each and all of such prior suits they *did* allege the substance of all the same matters as are here alleged, and that the prior pleadings specifically showed actual knowledge on the part of the plaintiff ever since 1933 of the very things he is now complaining of.

Petitioner contends that this is a suit on a written contract, and that the 10 year Statute of Limitations is applicable (Sec. 1013, R. S. Mo., 1939). We have already seen that this is, in reality, an action for relief *on the ground of fraud,* and therefore limited by Section 1014. It could be nothing else; the written contract has been adjudged not to include or permit any such provisions as plaintiff claims and it has been dissolved or merged into a general verdict and judgment for the defendant rendered in 1933. It is *gone.* The things plaintiff has since alleged so strenuously are the very antithesis of that policy-contract. However, if this could possibly be considered as a suit upon a written contract, the result is the same. A period of *eleven* years had intervened between the trial of the law action and the filing of the present suit. We have seen that there were no "improper acts" within the meaning of the law, which would toll the running of any Statute after the knowledge acquired by plaintiff in May, 1933. So it really makes little difference which Statute is applicable, though we are firmly convinced that it properly is Section 1014. Sec. 5844, R. S. Mo., 1939, cited by plaintiff, provides among certain other things that a soliciting agent shall be deemed to be the agent of the company and not of the insured (*Bennett* v. *Royal Union,* (Mo. App.) 112 S. W. 2d 134, 146-147). It is wholly inapplicable here; in fact it, and the following section, are penal statutes. Sections 1013, 1014 and 1031 discussed above are set out in the appendix to this brief.

It is entirely probable that the period of limitations began to run (so far as any reformation is concerned) from the receipt of the policy by plaintiff in 1929, for he was advised by its very terms that *no agent* had authority to change it or waive any of its provisions. And he was legally charged with knowledge that such provision

was valid and effective (88 F. 2d 407). The application itself contained a like notice and an *agreement* that no information had been furnished to any agent except as written therein, and that no information or statements not included therein should be binding on defendant. Under these circumstances the Missouri authorities hold that a person accepting and retaining such a policy without promptly seeking relief, is bound by its provisions. See: *Steward* v. *Mutual Life Ins. Co.*, (Mo. App.) 127 S. W. 2d 22; *McHoney* v. *German Ins. Co.*, 52 Mo. App. 94, 99; *American Ins. Co.* v. *Neiberger*, (Mo. Sup.) 74 Mo. 167; *Winegardner* v. *Service Life*, (Mo. App.) 59 S. W. 2d 712; *Raker* v. *Service Life*, 226 Mo. App. 1233, 49 S. W. 2d 285; *Christensen* v. *New York Life*, 160 Mo. App. 486, 141 S. W. 6. In some of these cases the insured had retained the policy only a few months, but was barred of relief. When we consider also the fact that plaintiff retained the policy here until after the alleged accident, elected to sue on the *policy alone*, and elected to submit the law action to the jury on *all* the issues raised therein, his lack of diligence becomes a certainty.

The motion to dismiss might properly have been sustained on the ground that the complaint affirmatively showed *laches*. Every allegation of this complaint shows that plaintiff is raising matters of which he has had both legal and actual knowledge for at least eleven years (and probably longer), and that during all this interim he has burdened the defendant enormously with the expense and inconveniences of sundry suits. Equity should certainly not extend its doctrines to accommodate a suit of this kind. Plaintiff has affirmatively shown a lack of diligence (88 F. 2d 407). Laches, of course, refers to the party's lack of diligence under all the circumstances and

to the *inequity* of his present claims. The lapse of time is an important element, though not the only element. Here we think the lapse of time alone would be sufficient to establish the bar—certainly the lapse of time, combined with the *actual* lack of diligence, the inequities of plaintiff's position and his continued harassment of defendant, would suffice. And the question of laches may be raised by motion to dismiss. *McMullen* v. *Lewis,* 32 F. 2d 481 (C. C. A. 4); *Young* v. *Southern Pacific,* 34 F. 2d 135 (C. C. A. 2); *Reed* v. *Fairmont Creamery,* 37 F. 2d 332 (C. C. A. 8); *Baker* v. *Spokane Savings Bank,* (D. C. Wash.) 5 F. Supp. 538, affirmed 71 F. 2d 487 (C. C. A. 9); *Nitkey* v. *S. T. McKnight Co.,* (C. C. A. 8) 87 F. 2d 916, It makes no difference that the present complaint is called one for "reformation," for its allegations and its objects are substantially identical with the previous suits in equity; and, after all, it seeks to *set aside* the prior law judgment (as did the prior equity suits), without which action no effective relief could possibly be granted.

Plaintiff complains of the manner in which the question of limitations was here raised; and in so doing relies on what his counsel assert to be the Missouri law. The motion (45-46) stated expressly that the claim was "barred by laches and by the Statutes of Limitation of the State of Missouri." An examination of petitioner's cited cases will disclose varying situations: in one (*Gibson* v. *Ransdell,* 188 S. W. 2d 35) a defendant filed a demurrer relying *specifically* upon a certain section of the statutes and *later* attempted to broaden his objections upon appeal. It was held that he would be confined to his theory below. Another case (*Murphy* v. *DeFrance,* 105 Mo. l. c. 62) refers solely to the question of pleading in an *answer.* In another (*Knisely* v. *Leathe,* 256 Mo. 341) a very specific demurrer was filed pleading

the wrong statute. In Missouri demurrers (now designated as motions to dismiss) are *statutory* and the grounds (as of the time of the present pleadings) therefor were specifically defined in Sec. 922, R. S. Mo., 1939; one such ground is that the petition does not state facts sufficient to constitute a cause of action, but no ground based on limitations is specified. The rule would seem to be, therefore, that the point may be raised by a general demurrer if the defect appears on the face of the petition, but must be specially pleaded if raised in an answer. Thus, in *State ex rel. Jones* v. *Nolte,* (S. Ct. Mo. *in Banc*) 165 S. W. 2d 632, 638, the court said:

> "Advantage of it must be taken by a demurrer if the running of the Statute appears on the face of the petition, or by a special plea if it does not."

And see *Ludwig* v. *Scott,* (Mo. Sup.) 65 S. W. 2d 1034, cited by the Circuit Court of Appeals. There is really no provision in the Missouri Statutes for a "speaking" demurrer.

But the Missouri rules of pleading did not control this case at the time of the filing of the Motion to Dismiss. It had been lodged in the United States District Court on removal and Rule 81 (c) of the Federal Rules required all pleadings and procedure thereafter to be governed by those rules. The motion to dismiss is sufficiently specific and the question of limitations may properly be raised upon a motion to dismiss. See: *Berry* v. *Chrysler Corporation,* (C. C. A. 6) 150 F. 2d 1002, 1003; *A. G. Reeves Steel Construction Co.* v. *Weiss,* (C. C. A. 6) 119 F. 2d 472, certiorari denied 314 U. S. 677; *Gossard* v. *Gossard,* (C. C. A. 10) 149 F. 2d 111, 113; *Hartford-Empire Co.* v. *Glass Co.,* (D. C. Pa.) 47 F. Supp. 711, 714; *Abram* v. *San Joaquin Cotton Oil Co.,* (D. C. Calif.) 46 F. Supp. 969, containing a full discussion of the question

with citations: *Wilson* v. *Shores-Mueller Co.*, (D. C. Ia.) 40 F. Supp. 729; *Wright* v. *Bankers Service Corp.*, (D. C. Calif.) 39 F. Supp. 980. And it seems, from the above cases, that beyond question the defendant might raise the question of limitations simply by an objection that the complaint fails to state a claim upon which relief can be granted; it pleaded considerably more here.

And, of course, the United States courts take judicial notice of the Missouri Statutes of Limitation, even where not specially pleaded. *Lamar* v. *Micou*, 114 U. S. 218, 223; *Hanley* v. *Donoghue*, 116 U. S. 1, 6; *Prudential Insurance Co.* v. *Carlson*, (C. C. A. 10) 126 F. 2d 607, 611; *Richter* v. *Empire Trust Co.*, (D. C. N. Y.) 20 F. Supp. 289.

The case was correctly ruled by the Circuit Court of Appeals on the question of limitations and its decision should not be disturbed.

B. The Question of Res Adjudicata.

The statement in this brief was made partly for the purpose of demonstrating to the court that the present suit is one upon a cause of action *substantially identical* with some of the previous suits, and that relief here is foreclosed also by the judgment in the original law action. The District Court based its ruling on the doctrine of *Res Adjudicata, not actually passing* upon the other grounds assigned; the Circuit Court of Appeals has seen fit to base its affirmance upon the ground of limitations. If the sustaining of the motion was proper upon either (or any) ground alleged, the writ of certiorari should not be issued or the judgment disturbed. *Helvering* v. *Gowran*, 302 U. S. 238, 245; *Securities and Exchange Com.* v. *Chenery Corp.*, 318 U. S. 80, 88; *Riley Inv. Co.* v. *Commissioner*, 311 U. S. 55, 59; *Farmers Guide Co.* v. *Prairie Farmer*, 293 U. S. 268.

This petitioner has, in reality, been alleging at least since 1935 the same substantive facts which he now

alleges. In each new suit a little cumulative material has been added, but nothing more. First, let us examine the issues, verdict and judgment in the original law action on the policy, determined in 1933 with no appeal, for this bears directly on petitioner's present contentions. The answer (55-59, 11880), the requests for a directed verdict (59-60, 11880), and the District Court's charge to the jury (61-77, 11880) all show conclusively that the following matters were directly in issue there and were submitted: (1) Whether plaintiff was *totally and continuously disabled* within the meaning of the policy; (2) If he was ever so disabled, whether disability began within the term of the policy; (3) If so, did disability result from bodily injuries caused directly and independently of all other causes by violent and accidental means? (*including the question as to whether any accident ever occurred at all* as plaintiff testified; (4) Was disability (if any) caused wholly or partly by disease or bodily or mental infirmity (and this would apply to any disease or infirmity occurring after the issuance of the policy as well as before, and to any physical disease as well as mental infirmity); (5) Whether defendant received *notice* of accident as required by the policy (the lack of which was specifically pleaded (57, 11880). (Note: the answer contained a general denial which, of course, required plaintiff to prove all his allegations.) All these issues were fully and painstakingly covered and submitted in the charge to the jury (61-77, 11880). The verdict was a *general verdict* (61, 11880). The suit was one upon this same policy for indemnity for the same alleged accident. A determination against plaintiff on *any one* of the above issues would have been (and is) conclusive against him as to *any* and all right of recovery. A *general verdict*, such as was rendered there, concludes *all issues* against the plaintiff. *Erie R. R.* v. *Schleenbaker*, (C. C. A. 6)

257 Fed. 667, certiorari denied 250 U. S. 666; *Lynch* v. *Darnell*, (C. C. A. 8) 265 Fed. 913, certiorari denied 254 U. S. 638; *Grand Trunk Western R. Co.* v. *Collins*, (C. C. A. 6) 65 F. 2d 875; *West Penn. Chem., etc., Co.* v. *Prentice*, (C. C. A. 3) 236 Fed. 891; *Kithcart* v. *Metropolitan Life Ins. Co.*, 119 F. 2d 497, 499. The jury may have disbelieved the plaintiff entirely, finding that there was *no accident*; it may have found that he was *never disabled* within the meaning of the policy from any cause; it may have found that he had given defendant *no sufficient notice* of accidental injury, which question was one of the contested issues in the case. An adverse finding on any of these issues (or certain others) would have forever foreclosed a recovery, and would render a "reformation" wholly immaterial. As said in 119 F. 2d l. c. 499, it has never been shown that the result of the law action would be different if it were tried again (and we may now say, parenthetically, that it has not been shown that the result would be different if the policy were *reformed* and the case retried). All causes of action upon that policy and all rights or supposed rights arising out of the policy have been merged into that judgment. As the court said in 88 F. 2d l. c. 410, plaintiff "*submitted his case to the court and jury, apparently taking chances on a successful outcome of the litigation.*" It is thus clear that he was precluded from a recovery *by an adverse determination of various issues other than the one he has now been seeking for 12 years to re-litigate;* in this situation the matter may certainly not be re-opened. The judgment in the law action was fully *res adjudicata* of his right to recover on that policy (in any form) for his alleged disability. And it certainly has not been shown, and cannot be shown, that on any other trial the result would be different, especially in view of the *various issues submitted and decided.* Such,

in any event, is a requirement (*Kithcart* v. *Metropolitan*, 119 F. 2d 497, 500).

In the prior equity suits (78-82, 11880, and 1-34, 11880) the plaintiff alleged in *much* detail: that he had told defendant's agents of his prior supposed insanity, that defendant had had him examined by a physician, and that thereupon the defendant (and not merely its agents—14, 15; and 80, 11880) *waived all prior defects*, assured him that no question of insanity could or would be raised in the future, waived all defenses based thereon, and *estopped* itself to defend against any future claim on the ground that prior conditions (mental or physical; had contributed to any claimed disability. In the first equity suit it was alleged that such agreements were *oral;* in the second, it was claimed for the first time (in 1940) that they were contained in *written documents*, elaborately described. But, aside from this contradiction, the net result in each such case was that the plaintiff claimed and alleged a waiver (for all purposes) of all prior defects, and an agreement of the defendant that it should and would forever be estopped to use any evidence thereof for any purpose in any future litigation. (Thus the only real difference between the first two equity suits was in the *form* of the supposed agreements, which is wholly immaterial). Plaintiff then, in each such case went on to allege that defendant failed to keep its agreement, that it produced evidence of his prior insanity, concealed the whereabouts of witnesses and the alleged records, and defeated him in the law action, *because he could not prove the agreements which he had made*. The Circuit Court of Appeals in 88 F. 2d l. c. 410 pointed out very clearly the sundry things which plaintiff and his counsel might then have done to protect himself, if his allegations were and are true. The court there said:

> "* * * If, as alleged, the defendant had records, plaintiff should have demanded their production, or have issued a *subpoena duces tecum* for the purpose of making them available. Plaintiff himself knew, according to the averments of the bill, of his alleged conversation with the soliciting agent. He also knew that he had been given a medical examination and that he told the physician 'of the action of the army surgeon,' so that apparently he was in position to testify to all the matters which he now says were suppressed by defendant. It was, of course, not the duty of defendant to prepare plaintiff's case for trial, nor to furnish him with evidence, at least without some request or demand so to do. He might even have dismissed his action without prejudice, if, as he now says, he was taken wholly unawares by the course of the trial; but this he did not do, but submitted his case to the court and jury, apparently taking chances on a successful outcome of the litigation."

In both of those equity suits, with multitudinous allegations of agreements of waiver and estoppel (oral and written) and of fraud on defendant's part in preventing plaintiff's use of such "agreements," final adverse decrees have been rendered against the petitioner and each of these decrees has been *affirmed*.

The prayer of plaintiff in case 11880 (the second equity suit) was very broad—for the taking of general equity jurisdiction, a decree for all the disability-indemnity benefits, a decree setting aside the law judgment and for such other equitable relief as seemed proper (21, 11880). That prayer is of the same effect, in substance, as the present prayer; but it should be noted further that the complaint in that last prior suit was filed on *April 18, 1940*, long after the present Rules of Civil Procedure for the District Courts took effect. Under these rules the court not only may, but "*shall*" grant all relief to

which a party is entitled on the facts alleged, whether prayed for or not. Rule 54 (c). See also: *K. C., St. L. & C. R. R.* v. *Alton R. R.*, (C. C. A. 7) 124 F. 2d 780; *Keiser* v. *Walsh*, (D. C. App.) 118 F. 2d 13; *Bastian* v. *U. S.*, (C. C. A. 6) 118 F. 2d 777; *Cooper* v. *Goldsmith*, (D. C. App.) 135 F. 2d 949. It seems, therefore, conclusive that a final disposition of a prior equity suit stating the same facts is *res adjudicata* in a subsequent suit, irrespective of the particular *relief* demanded in either suit.

We omit here further reference to the two law actions for damages which were filed and dismissed, but they also contained the substance of all the same allegations. In the present case plaintiff really adds nothing to his previous claims and allegations. He still claims the preparation and execution of the same so-called "*preliminary documents*," that defendant thereby estopped itself from using any evidence of prior mental or bodily ills in legal proceedings thereafter, and that defendant and its agents by fraud concealed the evidence and prevented him from a successful defense of the law action (thus ignoring all the *other* issues and defenses involved and voluntarily submitted in the law action). This is just what he has been claiming ever since 1935. This present complaint is in no sense substantially different from the prior ones; there are changes in wording here and there, apparently made as new ideas have occurred to the plaintiff to fit the changing theories. But the whole theme is the same; that defendant made agreements of "estoppel," later denied them, prevented plaintiff from using such agreements by its fraud, and defeated him in the suit on the policy.

Plaintiff now says that he previously *misconceived* his remedies on these same alleged facts. He seems to say that he did not know until after the last decision

of the Circuit Court of Appeals (119 F. 2d 497, April 30, 1941), and indeed until he was *"finally appraised and convinced"* (present petition, p. 17) by this court's denial of certiorari on March 2, 1942 (315 U. S. 808), that he could not recover on the policy without reformation, or that extraneous evidence (such as he claims to have), was not admissible therein to prove an estoppel; that therefore, after 12 years, he should be granted a *reformation* of the policy, in order to make admissible the very matters which the Court of Appeals has *twice said* were wholly immaterial and incompetent to vary the contract. He has indeed been hard to *"convince."* The District Court told him in May, 1933, *so he says* (13) that such evidence was not admissible; the Court of Appeals told him so in 88 F. 2d 407 (March 9, 1937). His allegations in the present petition are *directly contrary to the record facts*. The two decisions of the Court of Appeals established no *new law*. Plaintiff and his sundry counsel (at least 3) are subject to the doctrine that everyone is *presumed* to know the law, even without being told. Certainly defendant is not to be sued forever because plaintiff and his counsel may continue to think up some new wording of the old litigation—"documents" instead of oral conversations, a slightly different prayer, or a plea that their previous actions have been *"misconceived"* —even though they knew all the facts (if there ever have been any "facts"). *Every* supposedly factual allegation that plaintiff now makes has been directly answered by the Circuit Court of Appeals in the opinions cited.

If, as the District Court and the Circuit Court of Appeals held, there is no difference between the first and second equity suits, then certainly there is no difference between the second one and the present one. A slight

broadening of the *prayer* cannot change the cause of action. *Fagin* v. *Quinn*, (C. C. A. 5) 24 F. 2d 42. There is certainly no other difference. And, in reality, even the prayers are the same; both complaints expressly ask that the law judgment *be set aside* and that plaintiff *be awarded, by decree, indemnity* for the full period of alleged disability. In the last prior suit *reformation* would necessarily be a part of the "other relief" to be granted if any effective relief was granted at all on plaintiff's allegations, for there would be no point in setting aside a law judgment and leaving the case open for a retrial on all the same issues under the same policy provisions. In the present suit the prayer is identical except that it expressly mentions "reformation." But reformation could not be granted without first setting aside the law judgment. The supposed object of both suits was to set aside the law judgment and procure an equity decree *establishing* some sort of a contract between plaintiff and defendant which would embody all the contentions of plaintiff, and which would be competent and conclusive against the defendant (Indeed in the first equity suit plaintiff expressly asked (82, 11880) that he be permitted to "present such evidence," which in effect would amount to a prayer for a reformation). Any setting aside of the previous law judgment and any "reformation" of the contract are so *interwoven* that even the prayers of the suits are legally identical; and all the suits actually are on the *same cause of action.*

The previous decisions of the Court of Appeals went further than a mere determination of the right to relief on those particular prayers; they held that nothing was alleged which was legally *actionable* at all, for any purpose, under any prayer. And nothing has here been added. If there ever was an attempt to prosecute a purported cause of action by *piece-meal,* such as was ex-

pressly condemned in this litigation at 119 F. 2d l. c. 500, this is it; and the situation is more exaggerated now, of course, than it was then, with still another suit filed.

If there is anything in the present complaint which has not been specifically adjudicated (and there is *not*) then the holding of the Court of Appeals in 119 F. 2d 497, l. c. 500, is applicable, as follows:

> "(6, 7) All the issues sought to be raised have been judicially determined adversely to the plaintiff in *Kithcart* v. *Metropolitan Life Insurance Co., supra.* Plaintiff does not plead any new cause of action, but at most he seeks to base his action upon some additional grounds. But a plaintiff cannot be permitted to prosecute a cause of action by piecemeal. A judgment upon the merits in one suit is *res judicata* in another where the parties and the subject matter are the same, and the judgment is binding not only as to matters actually presented to sustain the plaintiff's cause of action, but also as to any other available matters which might have been presented. *Kithcart* v. *Metropolitan Life Ins. Co., supra*; *Edwards* v. *Terminal Shares*, 8 Cir., 109 F. 2d 974; *Engebretson* v. *West*, 8 Cir., 111 F. 2d 528; *Continental Natl. Bank* v. *Holland Banking Co., supra*; *Northern P. R. Co.* v. *Slaght, supra.* * * *"

In the last preceding equity suit an application for certiorari was denied (315 U. S. 808). We venture to assert that no court ever entertained a suit for reformation under circumstances similar to these. Any reformation of the policy at this stage would permit a relitigation of the same issues which have been concluded by the judgment rendered in 1933, as well as by each of the subsequent equity decrees.

The so-called "reformation" which plaintiff seeks would not be a reformation of the policy at all. It would,

in substance, change an accident policy (strictly limited to such) to a general *health* policy covering disability from practically *any* cause, and incorporate also a clause making it incontestable from its date of issue. Surely no such thing can be done, for the relief so sought is entirely inconsistent with the very theory and purpose of the policy as applied for and issued.

We refrain from any citation of authorities on the general doctrine of *res adjudicata* as applied in successive suits on the same cause of action. But even if this were to be considered a suit on a new or different cause of action (which it certainly is *not*) still every issue raised and litigated between the parties in the previous suits is *res adjudicata*. *Sou. Pac. R. R.* v. *U. S.*, 168 U. S. 1, 48; *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 319; *Geo. H. Lee Co.* v. *Federal Trade Com.*, (C. C. A. 8) 113 F. 2d 583, 586; *National Surety Corp.* v. *Ellison*, (C. C. A. 8) 88 F. 2d 399, 407; *Henderson* v. *U. S. Radiator Co.*, (C. C. A. 10) 78 F. 2d 674; *Cont. National Bank* v. *Holland Banking Co.*, (C. C. A. 8) 66 F. 2d 823.

The various equity suits here involved are so far identical that the previous decisions of the Court of Appeals are really the *law of the case*, and therefore unassailable under the well recognized doctrine regarding successive appeals. See *Finley* v. *United Mine Workers*, (C. C. A. 8) 300 Fed. 972, and cases there cited (Opinion modified on other grounds, 268 U. S. 295).

Plaintiff heretofore relied on the case of *Northern Assurance Co.* v. *Grandview Bldg. Co.*, 203 U. S. 106, as eliminating the defense of *res adjudicata*, and cites it here. The facts in that case must be considered. In a previous law action the *only question* involved had been the admissibility and effect of extraneous evidence to overcome a policy requirement that the existence of other

insurance (fire) must be endorsed on the policy, as stated in the second syllabus in the law action (183 U. S. 308)—"and hence the question in this case is reduced to one of waiver." In the law action the plaintiff *expressly pleaded* in detail (183 U. S. 310, 311) a waiver of the policy provisions by reason of notice to and knowledge of the defendant's agents. A special verdict was returned which found the giving of the oral notice to a "recording agent" and the essential facts upon which plaintiff relied to establish a waiver. The court held, however (in the law action), that the policy provisions were valid and binding, and that oral notice was insufficient to establish the claimed waiver. It further appears (203 U. S. 106, 108) that prior to the institution of the law action the Supreme Court of Nebraska and the Circuit Court of Appeals for the Circuit had held that *"the law was competent to give a remedy"*—in other words, that plaintiff might rely upon and establish a waiver in a law action upon the policy. It must be noted that the *plaintiff there, in the law action, pleaded and relied solely and expressly upon the theory of waiver and that there were no other substantial issues.* In the equity suit (decided in 1906) the court merely held that plaintiff was still pursuing his same theory of waiver, that in filing the law action he had followed the decisions as theretofore declared, and that in view of such decisions he probably had no *choice* of a remedy but was required to sue at law. The distinctions between that situation and the present one are readily apparent: (1) In the case cited the only question between the parties was, how could the waiver be proved; in our case (law) no waiver was *even pleaded,* and many other substantial and contested issues were involved and submitted. (2) In the case cited there had only been one previous judgment, namely, in the law ac-

tion on the policy; here there has not only been a law judgment on *sundry* contested issues, but two final equity decrees in cases *substantially identical with the present suit* which fact wholly distinguishes the present case from the one cited. (3) The law in this jurisdiction at the time of plaintiff's law action (1933) was clearly established that plaintiff *could not* vary the terms of the application and policy by oral evidence (See 88 F. 2d 407, and cases there cited). (4) In our case the plaintiff undoubtedly *did* make a binding election by proceeding to a submission on various issues other than that of waiver (the issue of waiver not even being properly raised or submitted in the law action). There was, and is, a direct inconsistency between the present plaintiff's submission of the law case on all the issues (especially when he had not even pleaded a waiver) and a subsequent plea to reform. It seems to us that a study of the cited case will indicate clearly that it is of no authority here.

The case of *Equitable Insurance Co.* v. *Hearne,* 20 Wall. 494, is also cited but it is clearly inapplicable on the present facts.

Plaintiff also cites *Baumhoff* v. *Railroad,* 205 Mo. 248; it is not in point. There the second suit, in reality, was merely an *equitable execution in aid of, and not in derogation of, the prior judgment;* the prior judgment established "plaintiff's right to the stock in kind" (l. c. 265); and to afford plaintiff the relief claimed in the second suit was merely to give full weight to all parts of the prior judgment and was in no sense inconsistent with it. The Missouri courts have long recognized the usual rules of *res adjudicata,* namely, that a judgment in a prior suit on the same cause of action is *res adjudicata* on all matters litigated and all matters which *might* have been litigated therein (See *State ex rel.* v. *Missouri Public*

Service Com., 351 Mo. 961, 174 S. W. 2d 871—*in banc; State ex rel.* v. *Hughes*, 347 Mo. 549, 148 S. W. 2d 576; *Cordia* v. *Matthes*, 344 Mo. 1059, 130 S. W. 2d 597; *In re Orth's Estate*, (Mo.) 169 S. W. 2d 401; *Kimpton* v. *Spellman*, 351 Mo. 674, 173 S. W. 2d 886; *Chance* v. *Franke*, 350 Mo. 162, 165 S. W. 2d 678), and also that a prior judgment is *res adjudicata* as to matters actually litigated therein, even in a subsequent suit on a different cause of action (See: *Gott* v. *Fidelity & Deposit Co.*, 317 Mo. 1078, 298 S. W. 83; *Missouri Dist. Telegraph Co.* v. *S. W. Bell Tel. Co.*, 336 Mo. 453, 79 S. W. 2d 257; *Hunter* v. *Delta Realty Co.*, 350 Mo. 1123, 169 S. W. 2d 936; *Kimpton* v. *Spellman*, 351 Mo. 674, 173 S. W. 2d 886; *Cooper* v. *Cook*, 347 Mo. 528, 148 S. W. 2d 512.

All of the last *four* suits filed by plaintiff have embraced the same issues, for only one substantive issue has ever been alleged. All these suits required the *same evidence* and all called for substantially the same result. The principle prohibiting the splitting of causes of action would, in itself, be a complete bar to the present suit.

In the case of *Fidel. & Guar. Fire Corp.* v. *Bilquist*, (C. C. A. 9) 108 F. 2d 713, it is clearly indicated that if a reformation is to be had, the original action on the policy must be kept open (by appeal or otherwise) and the pleadings amended to raise that issue before final judgment.

II.

The Constitutionality of the Removal Statutes.

We doubt that this point merits any serious or extended discussion. It is difficult for us to grasp the petitioner's theory. Apparently it is that the "Privileges and Immunities" clause of the Fourteenth Amendment *nullifies* Article III, Sections 1 and 2, and the legislation

enacted pursuant thereto, so far as any *removal of a cause* is concerned, at least on the ground of diversity of citizenship. In this contention counsel seems to ignore the fact that the Fourteenth Amendment is a restriction on the states—not upon the Federal power or jurisdiction; it was directed against the actions of state legislatures, and state officers (judicial or otherwise) in the making and enforcement of *state laws*. It has no relevancy to the validity of the removal statutes. It is the act of *denying* a removal (whether by judicial or legislative act) rather than the *granting* of one, which would deny the "Privileges and Immunities" of a citizen within the meaning of the Fourteenth Amendment (as so held in effect in the cases denying the validity of anti-removal statutes).

It is provided that the Judicial Power of the United States "*shall extend*" to all cases arising under the Constitution and laws of the United States, and to controversies between citizens of different States; and it "*shall be vested*" in such inferior courts as Congress may ordain (Article III, Sections 1, 2). The Constitution has given to Congress the *express power* (Article I, Section 8): "To constitute Tribunals inferior to the Supreme Court"; and the further *express power* to make all laws necessary and proper to carry into execution the Judicial Power so created. Under that express grant of power, Congress has acted (Judicial Code, Sections 28, 29; Secs. 71, 72, Title 28, U. S. C. A.).

The validity of these Statutes (as applied to diversity of citizenship cases) was expressly upheld in the early cases of: *Insurance Company* v. *Dunn*, 19 Wall. 214, 226 (86 U. S. 214), and *Railway Co.* v. *Whitton*, 13 Wall. 270, 287-288 (80 U. S. 270), it being further held that a corporation was a citizen, within the meaning of the acts. Even in those cases the constitutionality of the removal statutes was referred to as a matter of uniform recognition.

In *Gaines* v. *Fuentes et al.*, 92 U. S. 10, the court said, l. c. 17, 18:

"* * * The Constitution declares that the judicial power of the United States shall extend to 'controversies between citizens of different States,' as well as to cases arising under the Constitution, treaties, and laws of the United States; but the conditions upon which the power shall be exercised, except so far as the original or appellate character of the jurisdiction is designated in the Constitution, are matters of legislative direction. Some cases there are, it is true, in which, from their nature, the judicial power of the United States, when invoked, is exclusive of all State authority. * * * But, in cases where the judicial power of the United States can be applied only because they involve controversies between citizens of different States, it rests entirely with Congress to determine at what time the power may be invoked, and upon what conditions—whether originally in the Federal court, or after suit brought in the State court; and, in the latter case, at what stage of the proceedings—whether before issue or trial by removal to a Federal court, or after judgment upon appeal or writ of error. * * * The validity of this legislation is not open to serious question, and the provisions adopted have been recognized and followed with scarcely an exception by the Federal and State courts since the establishment of the government. But the limitation of the original jurisdiction of the Federal court, and of the right of removal from a State court, to a class of cases between citizens of different States involving a designated amount, and brought by or against resident citizens of the State, was only a matter of legislative discretion. The Constitution imposes no limitation upon the class of cases involving controversies between citizens of different States to which the judicial power of the United States may be extended; and Congress may, therefore, lawfully provide for bring-

ing, at the option of either of the parties, all such controversies within the jurisdiction of the Federal judiciary."

These cases have been followed in an unbroken line. See *Ellis* v. *Davis*, 109 U. S. 485, 498; *Hess* v. *Reynolds*, 113 U. S. 73, 77; *Whelan* v. *N. Y., etc., R. R.*, 35 Fed. 849, 858, 859; *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U. S. 246, 258 (dissenting opinion which was later adopted by the court at 257 U. S. 529); *Herndon* v. *Chicago, R. I. & Pac. Ry.*, 218 U. S. 135, 159; *Wisconsin* v. *Philadelphia & Reading Coal & Iron Co.*, 241 U. S. 329, 332, 333; *Terral* v. *Burke Const. Co.*, 257 U. S. 529; *Harrison* v. *St. L. & S. F. R. R.*, 232 U. S. 318; *Central Union Fire Ins. Co.*, v. *Kelly*, (C. C. A. 8.) 282 Fed. 772.

In *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U. S. 246, the opinion of Mr. Justice Day, later adopted as the law of this court (257 U. S. l. c. 533) was in part as follows, l. c. 258:

> "* * * The Constitution of the United States and the laws passed in pursuance thereof are the supreme law of the land, and of controlling authority over all the people, and in all the States of the Union. It is equally well settled that the privilege of resorting to the Federal courts for litigation of rights in controversies between citizens of different States is created by and exercised under authority of the Constitution of the United States, which secures to citizens of another State, when sued by a citizen of a State in which the suit is brought, the absolute right to remove their cases into the Federal court upon compliance with the terms of the act of Congress enacted to effect that purpose. This principle was announced in terms in *Insurance Company* v. *Morse*, 20 Wall. 445, has never been questioned, and is affirmed in frequent decisions of this court."

In *Terral* v. *Burke Construc. Co., supra,* and the various other cases holding *unconstitutional* state statutes forbidding (in various forms) the removal of causes by non-resident corporations licensed to do business in the state, this court has necessarily held (and *stated*) that such right of removal is a *constitutional* right; otherwise the statutes in question would not be *unconstitutional.* This rule has been consistently followed. See the cases heretofore cited, and also: *Illinois ex rel. Hakanson* v. *Palmer, Director of Insurance,* 367 Ill. 513, 11 N. E. 2d 931, certiorari denied 364 U. S. 561; *Mortensen, Commissioner,* v. *Security Ins. Co.,* 289 U. S. 702; *Hanover Fire Ins. Co.* v. *Harding,* 272 U. S. 494, 517. These authorities expressly affirm the unconstitutionality of *all* anti-removal statutes and the *constitutionality* of the statutory right of a non-resident to remove. The whole theory of these cases is that a state cannot be permitted to destroy or require the waiver of a right granted to citizens of other states *under the Federal Constitution,* and that the right to remove *is such a right.* And this does not depend upon the character or nature of the business transacted in the state. *Terral* v. *Burke Construction Co.,* 257 U. S. 529. There can be no serious question of the constitutionality of the Removal Statutes based on diversity of citizenship. In every case which has been tried in the Federal Courts on removal in approximately one hundred and fifty years, the constitutionality of the removal statutes has been directly or indirectly upheld.

Certainly the plaintiff has the right to institute a suit in the Missouri courts but he does so subject to the paramount conditions imposed by the Federal Constitution and the laws enacted by Congress thereunder. The citation of cases holding that states have no right to *exclude* citizens of other states (and of the United States)

from their courts are wholly inapplicable. Missouri has not excluded plaintiff from her courts; the defendant has merely exercised its Constitutional right of removal. And a Missouri court may certainly not be criticized for recognizing the provisions of the Federal Constitution.

Counsel's arguments regarding the "two legal capacities" and two citizenships have no practical application to this case. The Fourteenth Amendment was never intended as a limitation upon the Judicial Power of the United States. *Virginia* v. *Rives*, 100 U. S. 313; *Farrington* v. *Tokushige*, 273 U. S. 284, 299; *Hodges* v. *United States*, 203 U. S. 1, 14; *Board of Education* v. *Barnette*, 319 U. S. 624; *Swank* v. *Patterson*, (C. C. A. 9) 139 F. 2d 145, and cases there cited. Petitioner is a "citizen of the United States," only to the extent and purpose that a *State* (not the Acts of Congress) may not take away his "privileges and immunities" by the *passage and enforcement of any state law.*

Moreover, the "Privileges and Immunities" clause was only intended to protect a citizen in the enjoyment of such rights *as are derived from the Constitution and Laws of the United States* and not from other sources. *Duncan* v. *Missouri*, 152 U. S. 377, 382; *Hamilton* v. *Regents of Univ. of Calif.*, 293 U. S. 245, 261; *The Slaughter House Cases*, 16 Wall. 36, 72-74; *McPherson* v. *Blaker*, 146 U. S. 1, 38; *Hensley* v. *Hensley*, 286 Ky. 378, 151 S. W. 2d 69; *Snowden* v. *Hughes*, 321 U. S. 1, 6-7; *Turning* v. *New Jersey*, 211 U. S. 78, 97; *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 539; *State* v. *McCanse*, 21 Oh. St. 209. If the question here were one involving the right of a citizen of some other state to use the courts of Missouri, then a question under the Federal Constitution might arise. But when the question is solely one of the action of a Missouri court (pursuant to Act of Congress) in transferring the case of a *Missouri* citizen, no possible

constitutional question is present. The petitioner, in claiming to be a citizen of the United States, cannot *ignore* his Missouri citizenship. And the right of a citizen of Missouri to sue in the courts of his own state, is not a right springing from the Federal Constitution or laws. The contention here made by the petitioner is *not* within the meaning or intent of the Fourteenth Amendment or of the decisions last cited.

Many of the cases counsel cites—such as *The Slaughter-House Cases*, 16 Wall. 36, 77; *Corfield* v. *Coryell*, Fed. Cas. No. 3230; *Ward* v. *Maryland*, 12 Wall. 418, 430; *McKnett* v. *Railway*, 292 U. S. 230, and others, merely hold (so far as we are here concerned) that a state may not deny to a citizen of *another* state, privileges which it grants to its own citizens. It is in that regard that the so-called "Citizenship of the United States" becomes of importance and not where a state is dealing with its own citizens.

We respectfully suggest that this point needs no further consideration.

CONCLUSION.

The writ of certiorari is only to be granted under exceptional circumstances, and this is certainly not such a case as to invoke the court's discretionary power. It is not a case of general or public interest; it is not a case in which any novel principles of law have been declared; it is not a case involving conflicts between different circuits; and it is not a case in which state law has been mis-applied. This plaintiff has had, not a "day in court," but fourteen years, and his sundry suits have received painstaking consideration from all the courts concerned.

The insinuations of *prejudice* on the part of the District Judge (now deceased) are entirely without foun-

dation and apparently are made at this late hour because the petitioner dislikes the court's adverse opinion (49-50). The cases cited on the question of prejudice are wholly inapplicable. It would be exceedingly strange if it required all these years (1935-1945) for a plaintiff to find that the same trial judge was prejudiced. Even a casual examination of the record will forever foreclose petitioner's claim of a lack of due process. The lower courts are to be commended for the efforts they have made, and the patience they have employed in an attempt to unravel the confused and confusing claims of this petitioner over the period of years which has elapsed.

We respectfully submit that the petition for the writ of certiorari should be denied.

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